BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

CONSTANCE D. NIBARGER Claimant	)	
VS.	)	
BOEING COMPANY Respondent	)	Docket No. 268,671
AND	)	
INS. CO. STATE OF PENNSYLVANIA Insurance Carrier	)	

ORDER

Respondent and its insurance carrier request review of the October 4, 2006 Review & Modification Award by Administrative Law Judge John D. Clark. The Board heard oral argument on January 19, 2007.

APPEARANCES

Dale V. Slape of Wichita, Kansas, appeared for the claimant. Kim R. Martens of Wichita, Kansas, appeared for respondent and its insurance carrier.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

This is an appeal from a review and modification proceeding. In the underlying Award, dated June 23, 2005, the Administrative Law Judge (ALJ) determined claimant suffered an 8 percent whole person functional impairment. That decision was affirmed by the Board on December 30, 2005. The claimant continued working for respondent until she was laid off as a result of respondent's sale of its commercial aircraft operations.

The claimant filed an application for review and modification on June 30, 2005. The litigated issue was whether claimant was entitled to a work disability (a permanent partial general disability greater than the whole body functional impairment rating). The ALJ found the claimant sustained a 69 percent work disability based upon a 70 percent task loss and a 68 percent wage loss.

The respondent requests review and initially argues that claimant is not entitled to a work disability because there was no causal connection between her layoff and her work-related injury. Respondent next argues that because claimant quit looking for work and returned to school she should not be entitled to a work disability.

In the alternative, respondent argues claimant has failed to establish a task loss because she had preexisting permanent physical restrictions before this accident which had already eliminated many of the tasks considered by her experts and she is able to perform the remaining tasks. Respondent also again argues that if a work disability is awarded it should only cover the time period before claimant returned to school. Finally, respondent argues that if a work disability is awarded it is entitled to a retirement benefit offset pursuant to K.S.A. 44-501(h) but the ALJ incorrectly applied the offset.

Claimant argues the ALJ's Award should be affirmed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

The claimant sustained repetitive mini-trauma whole person injuries due to her work activities for respondent from August 2001 through October 2002. In an Award, dated June 23, 2005, the ALJ determined the claimant suffered an 8 percent whole person functional impairment. The Board affirmed that decision.

Claimant's injuries became symptomatic while she was performing a job working with "caterpillar" parts. She was then returned to her sealant job. She continued to perform that job until her last day worked when the layoff occurred. But as claimant performed her sealer technician position she was accommodated with no overhead work and lighter work not picking up parts that weighed more than 25, 35, or 45 pounds at different times. And the tools used in performing the sealant job were replaced with ergonomic tools that allowed claimant to perform her job within her restrictions. Claimant noted that as she continued working her pain would wax and wane as she would have good and bad days at work.

Claimant's last day of employment was May 20, 2005, when she was laid off. But respondent continued to pay her full paycheck until June 18, 2005. Respondent had sold

its commercial aircraft operation to Spirit. The claimant looked for work from June 24, 2005 through March 10, 2006[1]. She returned to school full time at Butler County Community College in February 2006. Thereafter, claimant did not continue to look for work. She is a full-time student.

Dr. George G. Fluter, who is board-certified in physical medicine and rehabilitation, examined claimant June 23, 2004, at the request of claimant's attorney. The doctor diagnosed, among other maladies that are not part of this claim, chronic right shoulder pain, chronic bilateral upper extremity pain, right medial epicondylitis, chronic neck pain, borderline to mild right carpal tunnel syndrome, probable left ulnar neuropathy, and myofascial pain. Dr. Fluter issued claimant permanent work restrictions to avoid repetitive work at or above shoulder level; repetitive forceful grasping using the hands; avoid use of power/vibratory tools; use thermal protection for the hands when working in cold environments; avoid repetitive bending, stooping, twisting, squatting, kneeling, crawling and climbing; and lift no more than 20 pounds occasionally and 10 pounds frequently. Dr. Fluter reviewed the list of claimant's former work tasks prepared by Mr. Jerry Hardin and concluded claimant could no longer perform 16 of the 23 non-duplicative tasks for a 70 percent task loss.

Jerry D. Hardin, a personnel consultant, conducted a personal interview with claimant on January 26, 2006, at the request of claimant's attorney. He prepared a task list of 23 non-duplicative tasks claimant performed in the 15-year period before her injury. Utilizing Dr. Fluter's restrictions Mr. Hardin opined claimant retained the ability to earn $300 a week.

The ALJ awarded claimant a work disability based upon Dr. Fluter's uncontradicted opinion that a 70 percent task loss resulted from the repetitive injuries she suffered from August 2001 through October 2002. The ALJ further determined that upon her return to school the claimant no longer exhibited a good faith effort to find appropriate employment. Consequently, the ALJ imputed a wage by adopting Mr. Hardin's uncontradicted opinion that claimant retained the ability to earn $300 a week.

Initially, respondent argues that there was no causal connection between claimant's loss of her job and her work-related injury. Respondent argues claimant returned to work after her accidental injury under permanent work restrictions but that the work restrictions were the same as what she had been given following a previous injury. Also she was laid off for economic reasons not because of her injury or restrictions.

The claimant's previous restrictions prohibited above shoulder work and no lifting greater than 25 pounds and a later restriction limiting repetitive grasping from 3 to 6 hours per day. After the instant injuries claimant was provided more stringent restrictions by Dr.

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[1] R.M.H. Trans., Cl. Ex. 2.

Fluter limiting claimant to occasional grasping and to avoid repetitive forceful grasp (which was accommodated by providing ergonomic tools), and claimant's lifting restriction was reduced to 20 pounds occasionally and 10 pounds frequently. And claimant was prohibited from using power/vibratory tools. Moreover, it was after the injuries the subject of this claim, that claimant was provided ergonomic tools to perform her job. Consequently, after the instant injuries the claimant's restrictions were not the same as her previous permanent restrictions.

Respondent argues the preexisting tasks lost due to restrictions imposed before claimant's present injury should be eliminated from the task lists in analyzing claimant's current task loss. The Board, however, considers it inappropriate to eliminate tasks that claimant performed during the relevant 15-year period prescribed by statute. The work disability formula provided by K.S.A. 44-510e(a) requires consideration be given to all "the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident." When the disability is found to be an aggravation of a preexisting condition, a deduction for any preexisting disability is to be made pursuant to K.S.A. 44-501(c). And the respondent has failed to prove entitlement to a K.S.A. 44-501(c) credit.

In this case claimant was provided accommodated work until she was laid off. The presumption of no work disability can be reevaluated if a worker in an accommodated position subsequently becomes unemployed.[2] Moreover, an injured worker with a substantial task loss as a result of the work-related injury may recover work disability even after returning to an unaccommodated job and thereafter being terminated for reasons unrelated to the underlying injury.[3] What is crucial is whether the injured employee is disabled in such a way that a subsequent termination, puts the employee at a disadvantage in the open labor market.[4] This is what often occurs when an employee's injury results in permanent restrictions. That is precisely what occurred in this case and consequently, claimant is entitled to a work disability analysis.

Because claimant has sustained an injury that is not listed in the "scheduled injury" statute, claimant's permanent partial general disability is determined by the formula set forth in K.S.A. 44-510e(a). That statute provides, in part:

> The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged

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[2] *Niesz v. Bill's Dollar Stores*, 26 Kan. App. 2d 737, 993 P.2d 1246 (1999).

[3] *Roskilly v. Boeing Co.*, 34 Kan. App. 2d 196, 116 P.3d 38 (2005).

[4] *Id.* at 200.

> together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. . . . An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.

But that statute must be read in light of *Foulk*[5] and *Copeland*.[6] In *Foulk*, the Kansas Court of Appeals held that a worker could not avoid the presumption against work disability as contained in K.S.A. 1988 Supp. 44-510e(a) (the predecessor to the above-quoted statute) by refusing to attempt to perform an accommodated job, which the employer had offered and which paid a comparable wage. In *Copeland*, the Kansas Court of Appeals held, for purposes of the wage loss prong of K.S.A. 44-510e(a), that a worker's post-injury wage should be based upon the worker's ability to earn wages rather than the actual post-injury wages being earned when the worker fails to make a good faith effort to find appropriate employment after recovering from the work-related injury.

> If a finding is made that a good faith effort has not been made, the factfinder *[sic]* will have to determine an appropriate post-injury wage based on all the evidence before it, including expert testimony concerning the capacity to earn wages. [7]

The Kansas Court of Appeals in *Watson*[8] noted that the failure to make a good faith effort to find appropriate employment does not automatically limit the permanent partial general disability to the functional impairment rating. Instead, the Court reiterated that when a worker fails to make a good faith effort to find employment, the post-injury wage for the permanent partial general disability formula should be based upon all the evidence.

After claimant was laid off she began a job search and provided a list of when and where she had inquired about or applied for work from June 24, 2005 through March 10, 2006. During this time period the claimant engaged in a good faith effort to locate employment. But after claimant was unsuccessful in her efforts to find post-injury employment, she then quit her job search and returned to college as a full-time student. Claimant has not continued her job search.

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[5] *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995).

[6] *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

[7] *Id.* at 320.

[8] *Watson v. Johnson Controls, Inc.*, 29 Kan. App. 2d 1078, 36 P.3d 323 (2001).

Respondent argues that because claimant quit looking for a job and returned to school she should be limited to her functional impairment. Respondent relies upon syllabus language in *Sharp*[9] to support its contention that because she is not looking for work while attending school she should be limited to her functional impairment. But, unlike respondent's interpretation of the language in the syllabus, the actual finding in *Sharp* was that claimant continued to make a good faith effort to find a job while also attending school.

The respondent in *Rash*[10], like respondent in this case, argued that the failure to make a good faith effort to find employment should limit the claimant to a functional impairment. The Court of Appeals analyzed the Board's reliance upon *Watson* in the following fashion:

> On appeal, Johnson argued that Watson's workers compensation award should have been limited to benefits for functional impairment because she voluntarily resigned from an accommodated position. The *Watson* court rejected Johnson's argument:
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> Johnson also asks this court to "refine" the standards for determining a disability award that have been developed through *Copeland II*, 26 Kan. App. 2d 803, 995 P.2d 369 (1999); *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997) (*Copeland I*); and *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995).
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> Specifically, Johnson appears to be asking for stricter penalties for not making a bona fide search for employment. We see no need for this. Under *Copeland I*: "If a finding is made that a good faith effort has not been made, the factfinder will have to determine an appropriate post-injury wage based on all the evidence before it, including expert testimony concerning the capacity to earn wages." 24 Kan. App. 2d at 320.
>
> This is precisely what the Board did. A failure to make a good faith effort simply allowed the Board to make its decision on facts which may be less favorable to the claimant had a good faith effort to find employment been made. 29 Kan. App. 2d at 1082.
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> Heartland argues this case is controlled by *Foulk* and *Copeland* and the Board has erroneously applied *Watson*. Heartland argues that application of the above case law should result in a finding that Rash is clearly not entitled to an award of benefits over and above his functional impairment. Heartland states that Rash failed to even attempt the offered accommodated work and should be limited to functional impairment as was the case in *Foulk*.

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[9] *Sharp v. Custom Campers, Inc.*, 31 Kan. App. 2d 772, 74 P.3d 42 (2003).

[10] *Rash v. Heartland Cement Co.*, ___ Kan. App. 2d ___, 154 P.3d 15 (2006).

> Rash contends the Board correctly applied the above case law in concluding that since he did not make a good faith effort to find postinjury employment, it was necessary to determine the appropriate postinjury wage based on all the evidence. See *Copeland*, 24 Kan. App. 2d at 320. We agree.

Rash reiterates that the work disability analysis is a two-step process. Initially, a determination is made whether claimant has made a good faith effort to find or retain appropriate post-injury employment. If so, claimant's actual wage is compared with claimant's pre-injury wage to determine the percentage of wage loss. On the other hand if it is determined claimant did not engage in a good faith effort to retain or find appropriate employment then *Copeland* requires a factual determination of an appropriate post-injury wage to impute based upon all the evidence including expert testimony concerning the claimant's capacity to earn wages. The fact that a job search has ended or was not engaged in good faith does not automatically limit claimant to the functional impairment. It is only when a review of all the evidence results in a determination that the appropriate post-injury wage to impute is at least 90 percent or more of the pre-injury wage that claimant is limited to the functional impairment.

Although claimant is to be commended for her initiative in returning to school, the law requires injured workers to prove that they have made a good faith effort to find appropriate employment before actual post-injury wages are used in the wage loss prong of the permanent partial general disability formula. And a return to school in order to increase an injured workers' marketability and wage earning ability can under certain factual circumstances be considered a good faith effort to find appropriate employment. For example, if a vocational expert agrees that obtaining a degree could improve claimant's employability and potentially increase her wages and indicates what claimant's wage earning ability would be after obtaining a degree or whether it would restore claimant to a comparable wage, then under such circumstances a return to school might be considered to demonstrate good faith. But in this instance, claimant has failed to satisfy that burden. Although her current wage earning ability is only 32 percent of what she was earning at the time of her accident (and even less than what she was earning at the time of her layoff) claimant has failed to show that her education will improve her marketability and/or wage earning ability. Accordingly, a wage will be imputed to claimant. And the Board adopts the uncontradicted opinion that claimant retains the ability to earn $300 per week which results in a 68 percent wage loss.

In this case the claimant's failure to establish a good faith effort to seek appropriate employment requires the Board to impute a post-injury wage. This is effective as of the date claimant stopped making a good faith effort. Again, the Board relies upon *Watson* and concludes that when a worker fails to make a good faith effort to find appropriate employment he or she is not automatically limited to the functional impairment, instead *Copeland* requires a determination of an appropriate post-injury wage based upon all the evidence including expert testimony concerning the capacity to earn wages.

The only evidence regarding claimant's task loss was provided by Dr. Fluter who utilized the task list prepared by Mr. Hardin to determine claimant had suffered a 70 percent task loss. The Board adopts and affirms the ALJ's finding claimant suffers a 70 percent task loss. Consequently, claimant has an 85 percent work disability for the time period from June 18, 2005, through March 10, 2006, when she was engaged in a good faith effort to find appropriate employment. After March 10, 2006, claimant no longer met her burden of proof that she was engaged in a good faith effort to find appropriate employment and her wage loss reduced from 100 percent to 68 percent based upon the imputed wage of $300 per week which results in a 69 percent work disability.

Respondent next argues the ALJ incorrectly applied the retirement offset.

K.S.A.44-501(h) provides:

> If the employee is receiving retirement benefits under the federal social security act or retirement benefits from any other retirement system, program or plan which is provided by the employer against which the claim is being made, **any compensation benefit payments which the employee is eligible to receive under the workers compensation act for such claim shall be reduced by the weekly equivalent amount of the total amount of all such retirement benefits,** less any portion of any such retirement benefit, other than retirement benefits under the federal social security act, that is attributable to payments or contributions made by the employee, but in no event shall the workers compensation benefit be less than the workers compensation benefit payable for the employee's percentage of functional impairment. (Emphasis Added)

In a Stipulation and Agreement filed August 30, 2006, the parties agreed that claimant had received a portion of her retirement benefits solely provided by respondent and pursuant to K.S.A. 44-501(h) the weekly equivalent was $30.82. In its submission letter to the ALJ, the respondent noted the parties had stipulated that any weeks of work disability compensation should be reduced by the stipulated $30.82 per week.

The ALJ's Award of Review and Modification recognized the parties' agreement and accordingly reduced the claimant's weekly payment rate by the stipulated $30.82 per week. But on review to the Board the respondent, in its brief, argued that the ALJ's application of the offset was unclear and violated equal protection considerations. It was further noted that respondent was raising the equal protection argument to preserve it for further appeal. The ALJ applied the weekly equivalent retirement offset exactly as respondent had requested in its submission letter to the ALJ. Under these facts, the Board would apply the retirement credit just as the ALJ did. As for the equal protection question, this issue was not addressed to the ALJ and therefore it will not be considered by the Board.

AWARD

WHEREFORE, it is the decision of the Board that the Review & Modification Award of Administrative Law Judge John D. Clark dated October 4, 2006, is modified to reflect claimant suffered an 85 percent work disability for the time period from June 18, 2005 through March 10, 2006, followed by a 69 percent work disability. The ALJ's Review & Modification Award is affirmed in all other respects.

The claimant is entitled to 33.20 weeks of permanent partial disability compensation at the rate of $432 per week or $14,342.40 a 8 percent functional disability followed by 37.86 weeks of permanent partial disability compensation at the rate of $432 per week or $16,355.52 for a 85 percent work disability followed by permanent partial disability compensation at the rate of $432 per week not to exceed $100,000 for a 69 percent work disability.

As of April 27, 2007, there would be due and owing to the claimant 130.20 weeks of permanent partial disability compensation at the rate of $432 per week in the sum of $56,246.40 for a total due and owing of $56,246.40, which is ordered paid in one lump sum less amounts previously paid. Thereafter, the remaining balance in the amount of $43,753.60 shall be paid at the rate of $432 per week until fully paid or until further order from the Director.

IT IS SO ORDERED.

Dated this _____ day of April 2007.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Dale V. Slape, Attorney for Claimant
Kim R. Martens, Attorney for Respondent and its Insurance Carrier
John D. Clark, Administrative Law Judge

BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

CONSTANCE D. NIBARGER	)	
Claimant	)	
	)	
VS.	)	
	)	
BOEING COMPANY	)	
Respondent	)	Docket No. 268,671
	)	
AND	)	
	)	
INS. CO. STATE OF PENNSYLVANIA	)	
Insurance Carrier	)	

ORDER NUNC PRO TUNC

This Nunc Pro Tunc Order will modify the Order issued by the Workers Compensation Board on April 27, 2007. In the Board's initial Order the award was improperly calculated using an incorrect permanent partial disability weekly payment rate that did not deduct the retirement benefit offset. This Order Nunc Pro Tunc corrects the award of the Board to reflect a weekly compensation rate which should have been $401.18 per week instead of $432 per week.

AWARD

WHEREFORE, it is the finding of the Board that the computation paragraphs on page nine of the Order should be corrected as follows:

The claimant is entitled to 33.20 weeks of permanent partial disability compensation at the rate of $432 per week or $14,342.40 for an 8 percent functional disability followed by 37.86 weeks of permanent partial disability compensation at the rate of $401.18 per week or $15,188.67 for an 85 percent work disability followed by permanent partial disability compensation at the rate of $401.18 per week not to exceed $100,000 for a 69 percent work disability.

As of April 27, 2007, there would be due and owing to the claimant 33.20 weeks of permanent partial disability compensation at the rate of $432 per week or $14,342.40 followed by 130.20 weeks of permanent partial disability compensation at the rate of $401.18 per week in the sum of $52,233.64 for a total due and owing of $66,576.04, which

is ordered paid in one lump sum less amounts previously paid. Thereafter, the remaining balance in the amount of $33,423.96 shall be paid at the rate of $401.18 per week until fully paid or until further order from the Director.

IT IS SO ORDERED.

Dated this _____ day of May 2007.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Dale V. Slape, Attorney for Claimant
Kim R. Martens, Attorney for Respondent and its Insurance Carrier
John D. Clark, Administrative Law Judge